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NORSHAM ABAS v. ARIF MEDIK SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN JC
[SUIT NO: 22NCC-278-09-2015]
14 MARCH 2016

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CONTRACT: *Void contract – Restitution – Plaintiff provided financial assistance to defendants pursuant to agreement – Agreement void for illegality – Whether defendants could be allowed to take advantage of illegality of agreement after benefiting from funds – Whether plaintiff entitled to restitution – Whether court has discretion to sever unlawful part of contract – Contracts Act 1950, s. 66*

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This was the plaintiff's application for summary judgment under O. 14 of the Rules of Court 2012 for part of the claim in the amended writ and amended statement of claim for repayment of RM1.5 million owed by the defendants to the plaintiff (encl. 13). The plaintiff and the defendants entered into a 'financial assistance agreement' ('the agreement') wherein the plaintiff agreed to provide financial assistance to allow the first defendant to come out of liquidation and pay all the debts owing to the creditors. Pursuant to cl. 1.1 of the agreement, the second defendant had unconditionally and irrevocably guaranteed as the principle debtor, jointly and severally and not merely as sureties, to pay and satisfy the plaintiff on demand of the funds. When the defendants failed, neglected and/or refused to repay the funds, the plaintiff gave notice for the immediate termination of the agreement and demanded for the immediate disbursement of the funds. The plaintiff submitted that it was her right to receive the principle amount by way of equitable remedy when the defendants had received and benefited from the funds and the first defendant had came out of the winding up status. On the other hand, the first defendant contended that the agreement was invalid/void and illegal and, where the contract which the plaintiff sought to enforce was expressly forbidden by the statute law, no court should lend assistance to give it effect.

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Held (granting order in terms to plaintiff's application in encl. 13 with costs):

(1) The first defendant had derived benefit from the payments received by the second defendant on behalf of the first defendant and therefore, should not be allowed to take advantage as to the illegality of the agreement. Section 66 of the Contracts Act 1950 applies notwithstanding the illegality of the agreement. In the circumstances, the plaintiff was entitled to restitution from the first and/or second defendants under s. 66 of the CA. (paras 24 & 25)

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(2) Even though the agreement was void *ab initio*, the second defendant had given an indemnity to the plaintiff that he was jointly and severally liable to pay and satisfy the plaintiff on demand of the return of the fund.

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Hence, the second defendant's obligation did not depend on the enforceability of the agreement. The second defendant's liability to indemnify the plaintiff was further substantiated by the fact that he was one of directors and shareholders of the first defendant and had approached the plaintiff for financial assistance. The second defendant also did not challenge the amount claimed except for the fact that the agreement was void. Therefore, the plaintiff's demand could be held against the defendants in a summary judgment application. (paras 30, 31 & 34)

(3) Although the agreement was found to be illegal or void *ab initio*, the court had the discretion to sever the unlawful part of the contract and enforce the legal portion of the agreement. (para 32)

(4) The defendants' had failed to satisfy that there was a fair or reasonable probability of the defendants having a real or *bona fide* defence. There was no difficult point of law involved. Triable issues for the purpose of granting leave to defend on the basis of the defendants' allegation alone was not sufficient. The defendants' allegation which was equivocal and inconsistent with undisputed contemporary documents was inherently improbable itself and should be rejected outright. The issues drafted by the first defendant did not form triable issues. (para 36)

Case(s) referred to:

American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd [2012] 1 CLJ 506 CA ***(refd)***
Juta Rasmi (M) Sdn Bhd v. Magilds Park Sdn Bhd [2015] 8 CLJ 399 HC ***(refd)***
Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd [1998] 3 CLJ 619 CA ***(refd)***
Menaka v. Lum Kum Chum [1976] 1 LNS 181 PC ***(refd)***
Murugesan v. Krishnasamy & Anor [1957] 1 LNS 44 HC ***(refd)***
Re Union Accident Insurance Co Ltd [1972] 1 All ER 1105; [1972] 1 WLR 640 ***(refd)***
Seascope Sdn Bhd v. Syed Izhar Syed Syed Salleh [2005] 8 CLJ 624 HC ***(refd)***
Yeep Mooi v. Chu Chin Chua & Ors [1960] 1 LNS 169 FC ***(refd)***

Legislation referred to:

Companies Act 1965 ss. 15(1), 27(7), (8), 236(1)
Contracts Act 1950, s. 66
Moneylenders Act 1951, s. 5(2)
Rules of Court 2012, O. 14, r. 2

Other source(s) referred to:

Poh Chu Chai, *Guarantees and Performance Bonds*, p 20

For the plaintiff - Muhammad Adam Abdullah, Aieshah Nadia Masdar & Faizah Aris; M/s Adam Abdullah & Mani
For the 1st defendant - Mohamad Fitri Khalis Ahmad Termizi; M/s Termizi & Co
For the 2nd defendant - In person

Reported by S Barathi

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JUDGMENT

Noorin Badaruddin JC:

[1] This is an application by the plaintiff for summary judgment under O. 14 of the Rules of Court 2012 ('ROC') for part of the claim in the amended
B writ and amended statement of claim dated 13 May 2015 ie for repayment of RM1.5 million owed by the defendants to the plaintiff (encl. 13).

[2] On 20 January 2016 this court allowed the application and the first defendant appealed. The reasons for the decision now follow.

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Facts

[3] By way of a letter of offer dated 29 November 2013, the Ministry of Agriculture and Agro-Based Industry Malaysia ('MOA') awarded the first defendant with RM37,550,000 fund ('the fund') to spearhead a project named as "Projek Titik Permulaan EPP#1 (Produk Herba Bernilai Tinggi)" ('The
D EPP Project'). When the said letter of offer from MOE was issued, the first defendant was wound up with effect from 24 July 2013.

[4] The first defendant wanted to come out of the liquidation and to pay all the debts owing to the creditors to enable it to pursue with the EPP Project and to gain the fund awarded. The second defendant representing the first
E defendant then approached the plaintiff to seek financial assistance to enable the payment of debts to the creditors of the first defendant. On behalf of the first defendant, the second defendant and the plaintiff entered into a "financial assistance agreement" ('the agreement') dated 16 May 2014 where *inter alia*, the plaintiff agreed to provide a financial assistance for a total sum
F of RM1,500,000 ('the funds') to and for the settlement of the first defendant's creditors who have filed in the proof of debt as follows:

(a) OCBC Bank Berhad for the amount of RM803,934.61

(b) Maybank Berhad for the amount of RM125,000

G (c) LAC Medical Supplies for the amount of RM165,130.75

[5] According to cl. 1.2 of the agreement, after paying the abovementioned creditors, the balance of the funds is to be paid through Messrs Hasnul Zuriati & Maizal who shall receive on behalf of the first defendant to enable them to discuss, negotiate and settle the other creditors apart from the ones
H mentioned above and payee which have yet to file the proof of debt with the Insolvency Department.

[6] Clause 2.1 of the said agreement further stated that the first defendant agreed to repay the plaintiff the said funds within 30 working days from the date of disbursement by the plaintiff.

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[7] According to cl. 1.1 of the said agreement, the second defendant unconditionally and irrevocably guarantee as principle debtors, jointly and severally, and not merely as sureties, to pay and satisfy the plaintiff on demand of the funds.

[8] The plaintiff performed her obligations under the said agreement and the following actions were executed:

(i) banker's cheque dated 20 January 2014 was given to the second defendant for payment of RM803,934.61 to OCBC Al-Amin Bank Berhad (exh. "NA-5" in the plaintiff's supporting affidavit).

(ii) banker's cheque dated 20 January 2014 was given to the second defendant for payment of RM134,183.10 to Maybank Berhad (exh. "NA-6" in the plaintiff's supporting affidavit).

(iii) banker's cheque dated 20 January 2014 to the second defendant for payment of RM185,000 to the Director-General of Insolvency (exh. "NA-7" in the plaintiff's supporting affidavit)

(iv) banker's cheque dated 20 January 2014 to the second defendant for the payment of RM276,882.29 to Messrs Hasnul Zuriati & Maizal (exh. "NA-8" in the plaintiff's supporting affidavit)

(v) plaintiff's cheque dated 6 February 2014 to the second defendant for payment of RM100,000 to Messrs Hasnul Zuriati & Maizal (exh. "NA-9" in the plaintiff's supporting affidavit).

[9] After the completion date ie 19 March 2014, the plaintiff demanded for the repayment of the funds from the second defendant orally. Since the defendants failed, neglected and/or refused to repay the funds, the plaintiff by way of a letter dated 12 January 2015 gave notice for the immediate termination of the said agreement as the repayments of the funds remained outstanding to this date. The plaintiff further demanded from the defendants for the immediate disbursement of the funds.

The Plaintiff's Contentions

[10] It was the plaintiff's submission that she was entitled to obtain part of the relief sought and pleaded in the amended writ and amended statement of claim dated 13 May 2015 by way of summary judgment. The fact that the plaintiff was not asking for the same judgment for the other reliefs does not reflect that there are triable issues in this matter. If there were any triable issues, they are for the other reliefs sought in the amended writ and amended statement of claim.

[11] The plaintiff argued that it is her right to receive the principle amount by way of equitable remedy when the defendants received and had benefited from the funds. The plaintiff cited the High Court case of *Seascope Sdn Bhd v. Syed Izhar Syed Syed Salleh* [2005] 8 CLJ 624 where it was held as follows:

> In order to recover the sum of RM4.5 million from the defendant pursuant to the equitable remedy of restitution of money had and received, the plaintiff will have to demonstrate three key elements, namely:

A i. That the defendant must have been enriched by the receipt of a benefit;

ii. That the benefit must have been obtained at the plaintiff's expense; and

iii. That it would be unjust to allow the defendant to retain that benefit

B (see: Golf & Jones- *The Law of Restitution*, Fifth Edn. (Sweet & Maxwell) p. 15)

[12] The plaintiff contended that the defendants had benefited from the agreement as the first defendant had come out of the winding up status after
C the payments were made to the creditors and the parties concerned through the documentary evidence of "NA-5" to "NA-9". The search done on the first defendant showed the status of the first defendant is 'existing'.

[13] The plaintiff further contended that the defendants admitted to the benefit that they have gained from the agreement and the only defence
D proffered was that the agreement was void *ab initio* as it was entered without any resolutions passed by the first defendant.

The First Defendant's Contentions

[14] The first defendant denied authorising the second defendant to enter
E the agreement with the plaintiff and that the matter was not brought to the attention of the Board of Directors comprising of three personnel including the second defendant. Therefore, the agreement was invalid/void and illegal as it was entered without the approval of all the directors/shareholders and there was no resolution as to that effect by the first defendant.

F **[15]** The defendants argued that there are serious questions to be tried ie:

(i) whether the agreement entered into between the second defendant and the plaintiff was void *ab initio;*

(ii) whether the second defendant had the power or mandate to enter the
G agreement on behalf of the first defendant without the knowledge of the first defendant's other directors/shareholders;

(iii) whether the agreement is void *ab initio* and could not be executed as it violated the provisions of the law; and

H (iv) whether the consideration in the agreement would also be null and void by virtue of issue (i) above.

[16] The defendants then highlighted to the court the various provisions of the law which were said to have been violated by the second defendant and the plaintiff in entering the agreement. The agreement was said to have been
I void on the ground that it contravened the provision of s. 5(2) of the Moneylenders Act 1951 which *inter alia* prohibits any person from carrying on the business of money lending without a valid licence. Further, the

defendants argued that money lending without a valid licence is a 'serious offence' under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001.

[17] Apart from the provisions mentioned above, the first defendant further submitted that the agreement contained provisions of selling and/or buying of shares in the first defendant which contravenes s. 15(1) of the Companies Act 1965 and/or art. 1(c) of the Article of Association and are offences under s. 27(7) and (8) of the same Act.

[18] Later in the written submission (reply) by the first defendant, another point was raised; that the agreement was void *ab initio* as the first defendant was wound up and automatically therefore ceases to exist. The Board of Directors became '*functus officio*'. Hence, the second defendant and/or the first defendant would have no authority to enter into the agreement as their powers were assumed by the liquidator. (*Juta Rasmi (M) Sdn Bhd v. Magilds Park Sdn Bhd* [2015] 8 CLJ 399 and *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105; [1972] 1 WLR 640). The first defendant highlighted the case of *American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd* [2012] 1 CLJ 506 where the Court of Appeal speaking through the judgment of Ramly Ali JCA (as His Lordship then was) stated:

> When a winding up order is made, the directors of the company remain in office but their powers are removed. While the company is in the process of being wound up a person cannot perform or exercise, and must not purport to perform or exercise a function or power as an officer (other than a liquidator) of the company, except with the approval of the liquidator of the court.

[19] It was further held in the same case that the power to carry on such a business under s. 236(1) of the Companies Act 1965 can only be performed and exercised by the liquidator with the authority either of the court or of the committee of inspection, not anyone else, not even the Board of Directors of the company (*American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd* [2012] 1 CLJ 506 *supra*).

[20] In the upshot, the first defendant's contention was that where contract which the plaintiff seeks to enforce is expressly forbidden by the statute law, no court should lend assistance to give it effect.

Findings Of This Court

[21] It is trite that once a company is wound up, the Board of Directors of the company becomes *functus officio*. The liquidator takes over the control of the activities of the company and no one but the liquidator can act for the company. *American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd* [2012] 1 CLJ 506 cited by learned counsel for the first defendant is relevant and applicable to the present case as to the legality of the agreement.

[22] Since the first defendant was wound up on 24 July 2013, the agreement entered into between the second defendant and the plaintiff is void *ab initio* as the second defendant could no longer act on behalf of the company and for the company at the material time.

[23] Nevertheless, from the pleadings, both the plaintiff and the second defendants averred that although they were aware that the first defendant was wound up and that the funds by the plaintiff were to be used for payment of debts to the creditors in the first defendant winding up, they had no knowledge as to the illegality of the agreement.

[24] This court found that the plaintiff had entered the agreement *bona fide* and without knowledge as to the illegality of the agreement. The agreement was prepared by a legal firm *vis-a-vis* Messrs Hasnul Zuriati & Maizal and yet no advice was given to the plaintiff as a lay person that the agreement was illegal. There were ample documentary evidence to show that the plaintiff had made the payments to enable the first defendant to pay its creditors and the official receiver. Ultimately, the first defendant was able to come out of the liquidation and this court is satisfied that benefit was derived by the first defendant from the payments received by the second defendant on behalf of the first defendant. The first defendant could not proffer evidence to the contrary. The only defence forwarded by the first defendant is only to the illegality of the agreement and that the second defendant was unauthorised to enter the agreement.

[25] From the affidavit in support, it is manifest that the plaintiff only knew of the illegality of the agreement subsequent to the making of it. Since the first defendant had obtained benefit from the funds given by the plaintiff to it, the first defendant should not be allowed to take advantage as to the illegality of the agreement. This court is of the considered view that s. 66 of the Contracts Act 1950 applies notwithstanding the illegality of the agreement. The plaintiff is entitled to restitution from the first and/or second defendant under the said s. 66 of the Contracts Act 1950. Section 66 of the Contracts Act 1950 provides as follows:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[26] The Privy Council in *Menaka v. Lum Kum Chum* [1976] 1 LNS 181; [1977] 1 MLJ 91 at pp. 93-94 held that despite a breach of s. 8(c) of the Moneylender Ordinance, s. 66 of the Contracts Act 1950 applied in that case. The Privy Council held:

> (2) in the circumstances of this case as neither party was aware of the illegality at the time of making the loan transaction and the documents were prepared and executed both sides in complete good faith, the appellant was entitled to restitution of the balance of the principal sum of $19,400.

[27] The Federal Court in *Yeep Mooi v. Chu Chin Chua & Ors* [1960] 1 LNS 169; [1981] 1 MLJ 14 followed the decision in *Menaka*. In this case the appellant brought the action for the recovery of money which she deposited with a person carrying on the business of a pawnshop. The Federal Court at p. 17 of the case stated as follows:

> In our view this case fits in squarely with the words of section 66 as an agreement which is "discovered to be void" does not mean that the contract is void on discovery or void because of discovery of illegality. It means what it says, in that the contract was void *ab initio* without the parties at the time being aware of the true legal position. It is only later that the contract is found to be void and so they became aware of its voidness. We are of the view therefore that section 66 of the Contracts Act applies to this, and the appellant is entitled to the restitution of her money by the pawnshop which received an advantage from its use (*Menaka v. Lum Kum Chum*).

[28] On the evidence adduced in this case, this court found that the first defendant is bound under s. 66 of the Contracts Act 1950 to restore such 'advantage' under the agreement received by it from the plaintiff's payment to the creditors.

[29] As for the second defendant, the plaintiff's amended statement of claim at para. 22 stated as follows:

> 22. Klausa 1.1 (a) Bayaran atas Tuntutan (Payment on Demand).
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> Perjanjian GID tersebut memperuntukkan bahawa Defendan Kedua telah bersetuju secara tidak boleh disangkal dan tanpa syarat, menjamin sebagai penghutang utama (principal debtors), secara bersesama dan berasingan, dan bukan sebagai penjamin semata-mata, untuk membayar dan melunaskan bayaran setelah dituntut oleh Plaintif secara sepenuhnya kesemua bayaran tertunggak dan perlu dibayar (payable) oleh Defendan Pertama terhadap Plaintiff di bawah Perjanjian FA tersebut atau sebarang jumlah lain yang tertunggak, sama ada tertentu atau di luar jangkaan (certain or contigent), sekarang atau selanjutnya terhutang sepertimana yang telah Plaintiff tanggung, daripada atau oleh Defendan Pertama termasuk semua faedah, kos dan caj-caj berkenaan.

[30] From the facts of the case, even though the agreement is void *ab initio*, the second defendant had given an indemnity to the plaintiff that he is jointly and severally liable to pay and satisfy the plaintiff on demand of the return of the fund. This court agrees with the submission by the plaintiff's learned counsel that the second defendant's obligation does not depend on the enforceability of the agreement. This court was referred to a book "*Guarantees and Performance Bonds*" written by Poh Chu Chai at p. 20 which stated:

> When an undertaking to answer for another's liability is construed as an indemnity and not a guarantee, liability is no longer on whether the principal contract between the principal debtor and creditor is enforceable. Liability of indemnity is dependent on the occurrence of an event specified in the indemnity and not on a third party's default.

[31] The liability of the second defendant to indemnify the plaintiff is substantiated by the facts that he (the second defendant) was one of the directors and shareholders of the first defendant. He was the one who approached the plaintiff and seeks the financial assistance from the plaintiff to 'rescue' the first defendant from its liquidation. In *Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd* [1998] 3 CLJ 619; [1998] 3 MLJ 860 the Court of Appeal through the judgment of NH Chan JCA (as His Lordship then was) stated at p. 627 (CLJ); p. 865 (MLJ):

> Shortly stated, 'an indemnity is a contract by one party to keep the other harmless against loss'; see per Holroyd Pearce LJ in *Yeoman Credit Ltd v. Latter* at p 295. See also s 77 of the Contracts Act which describes a contract of indemnity as: 'A contract by which one party promises to save by other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person'.

[32] This court found that although the agreement was found to be illegal or void *ab initio*, this court has a discretion to sever the unlawful part of the contract and enforce the legal portion of that agreement. In *Murugesan v. Krishnasamy & Anor* [1957] 1 LNS 44; [1958] MLJ 92 the court stated as follows:

> It is well-settled law that if the several distinct promises are made for one and the same lawful consideration and one or more of these promises is such as the law will not enforce that will not of itself prevent the rest from being enforceable.

[33] Further, this court is of the considered view that cl. 2(o) stated:

> Clause 2(o) - Conclusive Evidence
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> That a written statement from the Grantee as to the amount due and owing by the Borrower shall be accepted by the Guarantor as conclusive evidence that the amount thereby appearing is due from the Borrower to the Grantee and payable on demand to the Grantee by the Guarantor.

[34] The plaintiff had issued the demand letter on 15 January 2015 as a notice to the second defendant that the first defendant had failed, neglect and/or refused to pay the funds given to the first defendant. The second defendant did not even challenge the amount claimed except for the fact that the agreement was void. This court found that the plaintiff's demand can be held against the defendants in a summary judgment application.

[35] Since the defendants had entered appearance, the amended statement of claim have been served on the defendants and that the amended affidavits in support of this application had complied with the requirements of r. 2 of O. 14, this court found in favour of the plaintiff's application. The plaintiff has established a case without having to go for trial and that she is entitled to the judgment.

[36] This court further found that looking at the whole facts and circumstances of the matter, the defendants have failed to satisfy this court that there is a fair or reasonable probability of the defendants having a real or *bona fide* defence. There is no difficult point of law involved. The legality of the agreement and whether the plaintiff is entitled to the return of the funds given to the first defendant were the only questions that need to be determined by this court and that legal point is unarguable and this court is not prevented from granting a summary judgment. Triable issues for the purpose of granting leave to defend on the basis of the defendant's allegation alone is not sufficient. The defendants' allegation which is equivocal and inconsistent with undisputed contemporary documents is inherently improbable itself and should be rejected outright. The issues drafted by the first defendant do not form triable issues.

[37] As such, this court granted order-in-terms to the plaintiff's application in encl. 13 with costs.